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Twenty-ninth session

SUMMARY RECORD OF THE 599th MEETING

Held at Headquarters, New York,
on Friday, 7 June 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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The meeting was called to order at 10.25 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 6

1. Ms. BOSS (United States of America) proposed the following amendment to cover situations where one person prepared a document and another person signed it: in the first sentence of paragraph 1, "of a person" should be inserted after "signature" and in subparagraph (a) "the originator" should be replaced by "that person". The words "of the data message" would have to be deleted from subparagraph (a).

2. Mr. MASUD (Observer for Pakistan) supported the United States proposal and suggested that, for the sake of consistency with other articles, the phrase "the requirement of" should be inserted before "that rule" in the first sentence.

3. Mr. SORIEUL (International Trade Law Branch) agreed that certain changes would have to be made for the sake of consistency. For example, "a rule of law" in the first sentence of paragraph 1 would have to be changed to "the law". In line with the United States proposal, "between the originator" in subparagraph (b) should be amended to read "between the person whose signature is required ...".

4. Mr. CHOUKRI (Observer for Morocco) maintained that it was not necessary to add "of a person" in the first sentence of paragraph 1, as a signature was always provided by a physical or legal person. However, in subparagraph (a), "the originator" should be changed to "the person who will sign" in order to indicate that that person approved of the message.

5. Article 6, as amended, was adopted.

Article 10

6. Mr. SORIEUL (International Trade Law Branch), referring to paragraph 274 of the Commission's report (A/50/17), said the Commission must decide on the placement of article 10 now that it contained two paragraphs, one on the provisions of chapter III and one on the mandatory provisions of chapter II. As it spanned two chapters, it would be logical to include it under chapter 1 on general provisions.

7. Ms. BOSS (United States of America) said the secretariat's proposal made a great deal of sense. Since there were very few provisions referring to chapter II in the more specific chapter III, the most appropriate place for the article was under the general provisions of chapter I.

8. Mr. MADRID (Spain) and Mr. ABASCAL (Mexico) agreed with the remarks made by the representative of the secretariat and the United States representative.

9. Mr. PHUA (Singapore) cautioned that the words "this chapter" in article 10, paragraph 1, would have to be changed if the article was moved to another chapter.

10. Mr. ZHANG Yuqing (China) said the problem raised by the representative of Singapore was difficult to solve. If "this chapter" were amended to read "this Model Law", it could mean that all 14 articles of the Model Law could be changed by agreement. If the article was moved to chapter I with an indication that chapter III could be varied by agreement, then there was no justification for moving it.

11. Mr. SORIEUL (International Trade Law Branch) explained that when there had been only one paragraph in the article, referring to chapter III, it had seemed logical to say "this chapter". However, it might make more sense to place the two-paragraph article referring to two different chapters in the general provisions portion of the Model Law. As indicated by the representative of Singapore, a drafting change would be necessary.

12. Mr. MADRID (Spain) suggested that the words "this chapter" should be replaced either by "Part I" or by reference to specific article numbers. That would avoid confusion if Part II of the Model Law were to be divided into chapters at a future date.

Article "x"

13. Mr. CHANDLER (United States of America) proposed the following amended text of article "x", paragraph 4: "If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is satisfied if the right or obligation is conveyed by the use of one or more data messages, provided a method is used to give reasonable assurance that the use of such data messages is unique." The concept of uniqueness could be explained in the draft Guide to Enactment of the Model Law (A/CN.9/426).

14. Mr. LLOYD (Australia) said it would be more logical for the final element of the United States proposal to be amended to read "reasonable assurance that such data messages are unique".

15. Mr. MAZZONI (Italy) said replacing the words "and if a rule of law requires that" by "and if the law requires that" raised the problem of which law was being referred to, since any one of a number of laws might come to mind, such as legislation relating to title and ownership or laws on carriage. A specific reference would thus be preferable. It would also be better to include in the paragraph the concept of agreement between the sender and recipient of a data message on the use of that method rather than paper, since the sender should not be given the power to impose the use of data messages for legal purposes. Lastly, the reference to "unique" at the end of the United States proposal was welcome, and should be reflected in the Guide.

16. Mr. CHANDLER (United States of America) said his delegation could accept the amendment proposed by the representative of Australia. The first Italian

proposal, however, might raise the problem of conflicts between laws, given the great variance between legal systems, some of which had very detailed provisions in that area and some of which had virtually none. Equally, the view that parties needed to agree on the use of data messages would interfere with current practice with regard, for example, to letters of credit and bills of lading. Nevertheless, it should be possible to use a paper document since parties in some States were simply not equipped for electronic data interchange, while parties that were so equipped might still find that the use of paper was necessary, if, for example, there were problems with the system. Insistence on agreement between the parties would, however, simply create impediments and impose conditions that did not currently exist.

17. Mr. MAZZONI (Italy) said using the phrase "the law" without further elaboration was not a solution if it was not clear what was meant. Regarding agreement between the parties, the proposed rules would allow a sender to use either electronic means or paper, which gave that party too much power.

18. Mr. ABASCAL (Mexico) said his delegation supported the United States proposal, as amended by the representative of Australia. He agreed with the United States representative that the imposition of a requirement of agreement between parties before use could be made if electronic means of transferring rights would frustrate the objectives of article "x", since the use of electronic means did not, in reality, constitute an imposition by the originator, but, rather, implementation of the way in which rights were transferred through an electronic system.

19. Ms. BOSS (United States of America) said that where sender and recipient were set up to transfer rights through electronic messaging it could be argued that there was already implicit agreement to send and receive messages. The question of whether a transferee could be required to take data messages if not equipped to do so or if there was a need for paper was a separate issue, relating to the right of the transferee to demand replacement paper. In fact under paragraph 3 transferees would have a unilateral ability to terminate data messages and substitute paper for such messages.

20. Mr. MAZZONI (Italy) said if the rule applied to a unified system embracing both parties then clearly the question of consent did not arise, since there was consent by virtue of adhering to the system. But the rule was not worded in such a way as to make it apparent that it applied to such systems. It could, in fact, apply to someone who had an electronic capability but did not wish rights to be transferred by electronic means, and the rule would also allow a switch from paper to electronic messages even if the recipient did not want that, an issue which was not addressed under paragraph 3, which, rather, dealt with the converse situation. In effect the proposal would embody an involuntary rule concerning the switch from paper to electronic means, even though that was not the purpose of the rule. Unless the rule were amended to indicate that it referred to a closed system, within which the question of consent did not arise, the issue still needed to be addressed.

21. Mr. LLOYD (Australia) said the paragraph did not confer upon the transferor a right to transfer by electronic means, but merely a legal equivalence between

data messages and paper. In actuality a recipient could simply say that paper was required and a transferor would then need to make appropriate arrangements.

The meeting was suspended at 11.30 a.m. and resumed at noon.

22. Mr. MADRID (Spain) said he supported the changes to article "x", paragraph 4, proposed by the United States and Australia. That paragraph did not impose any obligations; like the rest of the Model Law, it was intended only to facilitate the use of electronic means of communication.

23. Mr. CHANDLER (United States of America) suggested that the Guide should clarify that the paragraph was not intended to make the use of electronic data interchange (EDI) mandatory.

24. Ms. REMSU (Observer for Canada) said she agreed with the delegations of the United States, Australia and Spain that there was no need to refer to the agreement of the parties, since the transfer of rights to goods was subject to agreement whether or not it involved EDI.

25. Paragraph 4, as amended, was adopted.

Draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426)

26. Mr.SORIEUL (International Trade Law Branch) introduced document A/CN.9/426), the annex to which contained the draft Guide to Enactment of the UNCITRAL Model Law. That text reflected the suggestions and decisions of the Working Group at its twenty-ninth session, as well as those of the Commission at its twenty-eighth session. In addition, the points raised at the Commission's current session would be incorporated into the final version of the Guide. He suggested that the Commission should discuss only the substantive points that should be reflected in the Guide; any terminological or other drafting changes should be submitted to the secretariat in writing. Although the Guide would not be finalized by the end of the current session, the Commission could adopt it because any changes in its content would be reflected in the report, which would be available by the end of the session.

27. Ms. BOSS (United States of America) said the Guide would have to reflect the Commission's earlier decision to change the words "electronic data interchange" in the Model Law's title to "electronic commerce". Accordingly, terms such as "EDI users" and "EDI practice" would also have to be changed. She was concerned about the use of the term "minimum requirements" in several places in the Guide because it seemed to invite legislatures to adopt further requirements, which was not the Commission's intent. The descriptions of "basic standards" in the sections on the concepts of "writing", "signature" and "original" were clearer, and the same technique should be used in all references to minimum requirements.

28. Mr. MADRID (Spain) asked whether the secretariat could provide delegations with a draft Guide showing the paragraphs in the order in which they appeared in the amended version of the Model Law. The Commission could then adopt the

substance of the Guide, though not the actual wording, when it adopted its report. The change in the name of the Model Law, noted by the United States, was also a change of perspective, which must be reflected in the Guide. The same was true of the decision to change "a rule of law" to "the law", which would require more extensive revision than a simple substitution of one term for another.

29. Mr. SORIEUL (International Trade Law Branch) said the Commission had two alternatives: to adopt the Guide without seeing the final document, in which case the Guide would be published along with the Model Law within a few months, or to wait until the next session to adopt the Guide. The disadvantage of the second alternative was that it could lessen the usefulness of publishing the Model Law in the current year, since the Commission had agreed that the Model Law must be read in conjunction with the Guide in order to be interpreted correctly.

30. Ms. BOSS (United States of America), supported by Mr. CHOUKRI (Observer for Morocco), said it would be dangerous to delay the finalization of the Guide until 1997 while publishing the finalized Model Law in 1996. Her delegation had full confidence in the secretariat's ability to incorporate comments from delegations in a final product, and called upon the Commission to approve the Guide, on the understanding that it would be revised to accommodate the changes made in the Model Law during the Commission's current session, the Commission's discussion of those changes, the comments made during the Commission's discussion of the Model Law and the written comments on the draft Guide submitted to the secretariat by delegations.

31. Mr. ABASCAL (Mexico), supported by Mr. SANDOVAL LÓPEZ (Chile), agreed that the adoption of the Guide should not be delayed. As had been done in the case of the draft Notes on Organizing Arbitral Proceedings, the secretariat should be given a mandate to implement the comments made during the Commission's debate on the Guide and provide a finalized document with the prior approval of the Commission.

32. Mr. LLOYD (Australia) said paragraph 78 of the Guide should be included under article 5, where the phrase "a rule of law" first occurred, and should be worded so as to refer to each of the subsequent occurrences of that phrase. Moreover, the third sentence of paragraph 84 appeared to contradict the sentence immediately preceding it. He also suggested the possibility of issuing a draft Guide pending publication of the finalized Guide.

33. Mr. STURLESE (France) said publishing the Guide and the Model Law separately would be regrettable; the Model Law needed to be read in the context of the clarifications contained in the Guide. A flexible approach, as suggested by the secretariat, would be to adopt the existing draft of the Guide and then mandate the secretariat to incorporate any substantive changes in it.

34. Mr. FARIDI ARAGHI (Islamic Republic of Iran) requested clarification as to whether the Guide would be published in two parts, in parallel with the two parts of the Model Law.

35. Mr. SORIEUL (International Trade Law Branch) said comments on the substance of article "x" would have to be integrated in the Guide once that article had been adopted; the Guide should also reflect the discussion on the significance of the Model Law's division into two parts. He suggested that a date should be added to the heading of the Guide, so that new material could be added in the future without requiring a change of title.

36. Mr. GOH (Singapore), supported by Mr. NIYOM-RERKS (Thailand), expressed doubts regarding the appropriateness of adopting the Guide without having considered the final version. The Model Law would be adopted at the Commission's current session, but the Guide could be adopted at the following session if necessary.

37. Mr. MASUD (Observer for Pakistan) said he joined previous speakers in expressing confidence in the secretariat's ability to prepare a final version of the Guide in the light of the current discussions. Moreover, in order to clarify the voluntary nature of the use of electronic commerce envisaged under the Model Law, he suggested that in paragraph 55 of the Guide the words "without in any way imposing it" should be added before the colon at the end of item (1) in the list of basic principles underlying the Model Law.

38. Mr. ZHANG Yuqing (China) said he completely agreed with the representative of Singapore in that there appeared to be no need to publish the Model Law and the Guide at the same time. The Model Law, if adopted at the current session, could be published first, but the many changes made in the Model Law during the current session would have an impact on the Guide. There appeared to be no precedent for allowing the secretariat essentially to rewrite the entire Guide on the Commission's behalf and then publish it without having the Commission examine the final version and amend it if necessary.

39. Mr. BURMAN (United States of America), supported by Mr. ABASCAL (Mexico) and Ms. REMSU (Observer for Canada), said the commentaries contained in the Guide reflected the provisions agreed to in the Commission's debates. There were precedents for allowing the secretariat to compile a finalized version of such commentaries with the Commission's prior approval, most recently in the case of the draft Notes on Organizing Arbitral Proceedings. Timely publication of the Guide and Model Law was important, in view of the desire of many countries to refer to the Model Law in formulating their own national legislation in the area of electronic data interchange.

The meeting rose at 1.05 p.m.